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No. 98-369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL,
Petitioners,
v.
FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE [1]

Amicus curiae, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the

[1] The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court. Counsel for no party has written any part of this brief, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of the brief.

exclusive bargaining representative of approximately 140,000 federal employees nationwide. Among those represented by NTEU are approximately 113,000 employees of the United States Department of the Treasury, 93,000 of whom work for the Internal Revenue Service, a subcomponent of that department. *See, e.g., Department of Treas., IRS v. Federal Lab. Rel. Auth.*, 494 U.S. 922 (1990).

NTEU and the employees it represents have a substantial interest in the resolution of the question here, regarding whether an Office of the Inspector General (OIG) investigator is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101-7135. That provision extends to those employees covered by the FSLMRS the rights established for private sector employees in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

IRS bargaining unit employees within the Treasury Department have a particularly vital stake in resolution of this case. Since 1951, these employees have been subject to interrogation by investigators with IRS' Office of Chief Inspector (the Inspection Service or Inspection); that office was charged with, among other things, carrying out investigations of possible employee fraud, bribery and other serious employee misconduct. As explained below, it was well established that IRS employees undergoing interrogation in those Inspection investigations were entitled to union representation under 5 U.S.C. 7114(a)(2)(B).

As a result of the recently enacted Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, 112 Stat. 685 (1998) (the IRS Reform Act), virtually all of the functions of the Inspection Service are transferred to a newly created Treasury Inspector General for Tax Administration (TIGTA), effective January 18,

1999.[2] IRS Reform Act § 1103(c). The investigations formerly conducted by Inspection will now be conducted for Treasury under the auspices of the newly constituted TIGTA by the same personnel who had been housed in Inspection.

Congress gave no hint, in passing the IRS Reform Act, that employee representation rights would be changed by the transfer of investigatory functions from Inspection to TIGTA. A ruling by this Court, however, that Inspector General investigators are, by definition, not "representatives of the agency" within the meaning of the FSLMRS would apparently terminate the long-held right of Treasury's IRS bargaining unit employees to representation in interviews that they reasonably believe could result in disciplinary action. Accordingly, NTEU files this brief in support of the respondents.

BACKGROUND

1. The bargaining unit at IRS, within the Department of Treasury, contains a range of employees, including revenue agents, revenue officers, tax examiners, customer service representatives, computer specialists, as well as secretaries and other lower graded employees. Allegations of serious misconduct by these employees have historically been investigated by individuals employed by the IRS Inspection Service.

The Inspection Service was established on October 1, 1951, in the wake of the discovery of serious corruption at the IRS. H.R. Conf. Rep. No. 105-599 (1998), *reprinted in* U.S.C.A. Spec. Ed., Internal Revenue Service Restructuring and Reform Act of 1998, at 77 (West

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[2] The provisions of the IRS Reform Act relating to the TIGTA are found primarily in Section 1103, which amends the Inspector General Act of 1978 (5 U.S.C. app. 3), and, to a limited degree, in Section 1102, which amends Section 7803 of the Internal Revenue Code of 1986 (26 U.S.C. 7803).

1998) (Conf. Rep.).[3] The mission of Inspection has been to "promote public confidence" in the IRS by providing "independent and professional" audits and investigations that, among other things, "[d]etect and deter fraud and abuse in IRS programs and operations." IRS, *A Guide to the IRS* 71 (1998) (Information about the Internal Revenue Service for Congressional Staff) (*Guide*). The Chief Inspector reported directly to the Commissioner and Deputy Commissioner of the IRS. As President Truman declared when the Inspection Service was founded, Inspection would be "completely independent of the rest of the [IRS]." Conf. Rep. at 77. The Inspection Service was not the component of the agency responsible for engaging in collective bargaining with NTEU.

One of Inspection's principal functions was to carry out employee conduct investigations involving allegations of illegal activities or any other improper acts of employees. Inspection's responsibilities thus included law enforcement duties—specifically, criminal investigations of employee conduct, such as fraud, bribery and assaults. *Id.* at 78. In connection with those duties, Inspection's investigators were authorized to execute and serve search and arrest warrants, serve subpoenas and summonses, make arrests without warrants, carry firearms, and seize property subject to forfeiture. *Id.* at 78-79.

Inspection had also been responsible for administrative investigations of other serious employee misconduct, such as ethical violations. IRS, *Internal Revenue Manual* 751.2(2), 751.31(2) (current version) (IRM). Results of Inspection's investigations were "reported to IRS managers, who determine if the employee is suitable for retention in the IRS or if other disciplinary action is necessary." *Guide* at 72; *see also* IRM at 751.31(3), 751.33, 10.132.

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[3] Citations to "Conf. Rep." will refer to the page numbers of the version reprinted in the U.S.C.A. Special Edition.

2. The mission and responsibilities of the Inspection Service—to promote the agency's effective and efficient administration and to detect and deter fraud and abuse—thus mirrored those of Inspectors General. *See, e.g.*, 5 U.S.C. app. 3, § 2. Indeed, since the creation of the Treasury Office of Inspector General (Treasury IG) in 1988, all audits and investigations of the IRS Inspection Service were subject to the oversight of the Treasury IG.[4] *Id.* at § 8D. Hence, the Inspector General Act mandated that Inspection "shall promptly report" to the Treasury IG all "significant activities being carried out" by that office. *Id.* at § 8D(a)(3)(b). In addition, the IRS Commissioner was required to consult with the Treasury IG before selecting someone for the position of Chief Inspector and all other senior executive positions within the Inspection Service. Conf. Rep. at 77.

3. On July 22, 1998, the President signed the IRS Reform Act into law. The Act was the culmination of an extensive congressional inquiry into the operations of the IRS; much of that inquiry focused on dissatisfaction with the Inspection Service.

a. Among the principal reforms made by the IRS Reform Act were the creation of an IRS oversight board and, by amendment of the Inspector General Act of 1978, the establishment of a second Department of Treasury IG, to be known as the Treasury Inspector General for Tax Administration (TIGTA). IRS Reform Act §§ 1101, 1103(a). The Act eliminated the IRS' Inspection Service; virtually all of its powers and responsibilities (in-

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[4] Pursuant to Memoranda of Understanding between the Commissioner of IRS and the Treasury IG, the latter was responsible for investigating alleged misconduct on the part of IRS employees at grade 15 and above; employees of the Office of Chief Counsel; and employees of the Office of the Chief Inspector. Conf. Rep. at 75. In addition, other allegations involving "significant or notorious" matters were to be referred to the Treasury IG, and investigations arising out of such referrals "generally" would be conducted by the Treasury IG. *Id.*

cluding the bulk of its investigatory personnel) have been transferred to the TIGTA. Conf. Rep. at 79, 83; IRS Reform Act § 1103(c). The TIGTA "is under the supervision of the Secretary of Treasury" (Conf. Rep. at 80), and also must make reports to the IRS oversight board and to Congress. IRS Reform Act § 1103(b)(6).

Thus, the TIGTA joins the previously existing Treasury IG. Under the new IRS Reform Act scheme, the Treasury IG will continue to perform its current duties—generally, the conduct of internal audits and investigations "relating to the programs and operations of the Treasury" —with the exception of those relating to the IRS. Conf. Rep. at 74; *see* IRS Reform Act § 1103(b) (amending 5 U.S.C. app. 3, §§ 8D(a)-(b)). The TIGTA "shall exercise all duties and responsibilities" of an IG "on all matters relating to the [IRS]." IRS Reform Act § 1103 (b)(7).

As a result of the transfer of Inspection functions effected by the Reform Act, the TIGTA is now charged with "conducting audits, investigations, and evaluations of IRS programs and operations . . . to promote the economic, efficient and effective administration of the nation's tax laws and to detect and deter fraud and abuse in IRS programs and operations." Conf. Rep. at 80. The TIGTA further absorbs Inspection's function of investigating alleged employee criminal conduct "as well as administrative misconduct . . . ." Conf. Rep. at 81; *see* IRS Reform Act §§ 1103(b)(7), (c).

The IRS will be requiring employees, under pain of discipline, to appear at TIGTA interviews and to answer questions. *See* Rule 214.1, Interim IRS Rules of Conduct (1994) (requiring employees to respond to questions concerning matters of official interest when directed to do so by a "competent authority"); 31 C.F.R. 0.735.48 (same). And, as was the case with Inspection, TIGTA will be reporting the results of its investigations to the IRS for any appropriate administrative action. Conf. Rep. 79-80.

b. The Senate Report, S. Rep. No. 105-174 (1998), which was largely adopted by the conferees, and the hearings held in connection with the IRS Reform Act shed light on the reasons for the transfer of functions from Inspection to the TIGTA. Briefly, the Congress believed that Inspection lacked sufficient autonomy from the IRS and that a more independent entity was needed to evaluate and improve IRS programs. *Id.* at 29. Testimony during the Senate hearings revealed an overriding concern with misconduct by agency management officials that had gone unchecked by Inspection. *IRS Oversight, Hearings on H.R. 2676 Before the Senate Comm. on Finance,* 105th Cong. 19, 199, 276 (S. Hrg. 105-598) (1998) (*Oversight Hearing*). Cited examples of misconduct included setting tax collection quotas (*id.* at 150, 159, 179); retaliation against whistleblowers (*id.* at 19, 41-42, 156); uneven enforcement of the tax laws, condoned or encouraged by management (*id.* at 130-135, 139-142, 146, 162-63); favoritism (*id.* at 153); and insufficient management response to taxpayer abuse or coverups (*id.* at 55, 60, 170-75).

IRS' response to these management abuses was faulted. There was testimony that management officials were disciplined less severely than rank and file employees (*Oversight Hearing,* at 17, 19-21, 273), and that Inspection was informing management of employee complaints about agency operations, which led to retaliation against those employees (*id.* at 17, 274). There was also considerable testimony that Inspection was too close to agency officials to investigate vigorously complaints about management. *Id.* at 238, 271; *IRS Restructuring, Hearings on H.R. 2676 Before the Senate Comm. on Finance,* 105th Cong. 433 (S. Hrg. 105-529) (1998) (*Restructuring Hearing*). The hearings further revealed a need to institute a mechanism that would encourage rank and file employees to report waste, fraud, and misconduct and to increase the accountability of managers. *Oversight Hearing,* at 44, 113, 277.

Ultimately, Congress decided that creation of an independent TIGTA was the best way to address these defects in the IRS and in the Inspection Service, in particular. The IRS Reform Act and its history make clear, however, that the TIGTA's autonomy is not absolute. Besides placing the TIGTA under the general supervision of the Secretary of the Treasury, the IRS Reform Act specified that the Commissioner of the IRS may request that the TIGTA conduct an investigation relating to the IRS. IRS Reform Act § 1103(b)(7) (amending 5 U.S.C. app. 3, § 8D by adding § (l)(1)). If the TIGTA declines to comply with that request, it is required to "timely provide a written explanation" for that refusal. *Id.* The Joint Explanatory Statement of the Committee of Conference underscored the conferees' clear expectation that the TIGTA "shall make all reasonable efforts to be responsive to the requests of the Commissioner . . . ." Conf. Rep. at 83-84.

SUMMARY OF ARGUMENT

The Solicitor General asks the Court to embrace a *per se* rule that Office of Inspector General investigators never function as "representatives of an agency" within the meaning of section 7114(a)(2)(B) of the FSLMRS. According to the Solicitor General, an OIG cannot be viewed as such because the phrase "representative of the agency" refers only to an "agency component that engages in collective bargaining with the union at issue," which does not include an OIG. (*See* NASA pet. for cert. at 12; *see also* NASA Br. at 18 (referring to "entity" that has a collective bargaining relationship with a union")). The error of this key principle is made particularly manifest when it is examined in the context of the Internal Revenue Service.

1. Among other things, the IRS Reform Act transfers virtually all of the functions and personnel of the IRS Inspection Service to a newly created Inspector General position within the Treasury Department, the TIGTA.

Prior to the IRS Reform Act's implementation, the Inspection Service performed a role akin to that of an IG—namely, to ferret out fraud and abuse in IRS programs and operations. Reporting directly to the Commissioner and independent of the rest of the IRS, Inspection's charge included the carrying out of both criminal and administrative investigations of alleged employee fraud and other serious employee misconduct. The Inspection Service was not, however, the component of the agency responsible for engaging in collective bargaining with NTEU.

It has long been settled under the FSLMRS that Inspection acted as a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B) when it conducted employee interviews. The cases, consistent with the FSLMRS and its legislative history, uniformly recognize this principle, and it has never been contested by the federal government. Indeed, the government has not taken issue with Inspection's role as a "representative of the agency" despite Inspection's operation, since 1988, as an adjunct of the Treasury IG, in important respects.

In short, contrary to the Solicitor General's key contention, the Inspection Service operated as a "representative of the agency" for *Weingarten* rights purposes, even though it was not the agency entity responsible for engaging in collective bargaining with the union.

2. The fundamental error of the Solicitor General's proposed *per se* rule is further underscored when assessed in connection with the transfer of functions effected by the IRS Reform Act. Under the Solicitor General's analysis, the *Weingarten* rights of IRS bargaining unit employees vanished upon the IRS Reform Act's conveyance of Inspection's functions and personnel to the newly created TIGTA—even though Congress never adverted to such a momentous consequence in the Act.

An inference that the IRS Reform Act has the effect of exterminating such fundamental employee rights as those

conferred by 5 U.S.C. 7114(a)(2)(B) cannot be squared with this Court's disfavored treatment of implied repeals of rights conferred by "express statutory text." *United States v. Fausto*, 484 U.S. 439, 453 (1987). Moreover, it strains credulity to assert that an OIG never functions as a "representative of the agency" where, as with the IRS, the new TIGTA will be interviewing employees with transplanted IRS Inspection Service investigators; will often be doing so at the behest of the IRS; and will be turning over that information to agency managers to be used in potential disciplinary actions against those employees.

ARGUMENT

For all the reasons stated by the respondents, the Eleventh Circuit correctly held that National Aeronautics and Space Administration Office of Inspector General (NASA-OIG) is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B). As the court understood, NASA-OIG acts as a representative of NASA Headquarters where it is a NASA subcomponent; conducts investigations on behalf of its parent agency; and then provides investigatory information to NASA and other of its subcomponents for use in employee disciplinary proceedings. *Federal Lab. Rel. Auth. v. National Aeronautics & Space Admin.*, 120 F.3d 1208, 1213 (11th Cir. 1997) (*FLRA v. NASA*).

In challenging the decision of the court of appeals, the Solicitor General urges this Court to adopt a *per se* rule that an OIG can never be a "representative of the agency" within the meaning of the FSLMRS. Specifically, the federal government maintains that the NASA-OIG cannot be considered a "representative of the agency" because that phrase encompasses only an "agency component that engages in collective bargaining with the union at issue," a role not played by the NASA-OIG. (NASA pet. for cert. at 12; *see also* NASA Br. at 18 ("the management entity that has a collective bargaining relationship with a union")).

This key premise—that engaging in collective bargaining is a predicate for being a "representative of the agency"—is demonstrably erroneous. As we show, the error of the Solicitor General's operating principle is made especially manifest when it is applied in the context of the Internal Revenue Service.

1. As described *supra*, prior to its elimination (effective January 18, 1999), the IRS Inspection Service performed a function essentially the same as that of an Inspector General. Like Inspectors General, IRS Inspection's purpose was to prevent waste, fraud and abuse in IRS' operations and programs. In pursuit of that goal, Inspection, among other things, carried out law enforcement investigations involving criminal as well as administrative misconduct.

Though not possessing the same degree of autonomy from its agency as an Inspector General, the Inspection Service reported directly to the Commissioner and Deputy Commissioner and was designed, as President Truman stated, to be "completely independent of the rest of the [IRS]." Conf. Rep. at 77-78; *see Guide* at 71. In carrying out its responsibilities, Inspection did not "engage in collective bargaining" with NTEU.[5]

a. Even though Inspection was not the agency entity charged with "engag[ing] in collective bargaining" with NTEU (NASA pet. for cert. at 12), and contrary to the position now advanced by the Solicitor General, the federal government has never contested that Inspection Service investigators have been "representatives of the agency" within the meaning of the FSLMRS.

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[5] From time to time NTEU has met with officials of the Inspection Service in order to air issues of concern to the union; similar consultations have occurred with the acting TIGTA. It was not, however, the function of the Inspection Service to "engage in collective bargaining" with the union. Until the IRS' recent reorganization, that function was performed through its Assistant Commissioner (Support Services). *See* IRM 1142.1, 1142.23.

More important, the cases involving bargaining unit employees' entitlement to union representation in the context of Inspection interviews uniformly recognize that Inspection's investigators functioned as representatives of the agency. Those cases have instead focused on whether 5 U.S.C. 7114(a)(2)(B)'s other elements had been satisfied, thus triggering an employee's right to representation. In *IRS v. Federal Lab. Rel. Auth.*, 671 F.2d 560 (D.C. Cir. 1982), for example, the court enforced the FLRA's ruling that the IRS had committed an unfair labor practice in refusing to allow an employee to have union representation at an interview conducted by Inspection Service investigators. The court found substantial evidence supported the Authority's finding that the employee interviewed could have reasonably feared discipline. *Id.* at 563-64. *Accord IRS and National Treas. Employees Union*, 15 F.L.R.A 626, 647-48 (1984) (right to union representation found where IRS employee was acting as investigator for Inspection); *Department of the Treas., IRS and National Treas. Employees Union*, 15 F.L.R.A. 360, 361 (1984) (finding no entitlement to union representation where Inspection investigators did not "examine" the employee in question.)

Moreover, the federal government has never challenged the status of Inspection as a "representative of the agency" within the meaning of the FSLMRS even though, since 1988, the Inspection Service has functioned, in essential respects, as an adjunct of the Treasury IG. As noted, all audits and investigations of the Inspection Service have been overseen by the Treasury IG (5 U.S.C. app. 3, § 8D (a)(1)); Inspection has also been required to promptly report all of its significant activities to the IG (5 U.S.C. app. 3, § 8D(b)). Further, the IRS Commissioner has had to clear his selections of the Chief Inspector and other top Inspection officials with the Treasury IG. *See supra* at 5.

b. The recognition of bargaining unit employees' right to union representation in the context of Inspection examinations could hardly have been avoided. There is clear evidence, reflected in the FSLMRS' legislative history, that Congress' decision to codify this Court's *Weingarten* decision in the FSLMRS was, in significant part, specifically animated by the plight of rank and file employees who were subject to interrogations by the Inspection Service.

The Statute's official history contains a predecessor version of section 7114(a)(2)(B) that was sponsored by Representative Clay, a key author of the bill that became the FSLMRS.[6] *See* H.R. 3793, 95th Cong. (1978), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 229, 230 (Comm. Print 1979) (*Leg. Hist.*). During hearings conducted by the Subcommittee on Civil Service on that predecessor measure, employee representative witnesses described, in graphic terms, the need for union representation of employees in the context of Inspection examinations. *See* H.R. Rep. No. 95-920 (1978), *reprinted in Leg. Hist.* at 645. That testimony was later specifically endorsed by the Subcommittee in its report accompanying H.R. 3793.[7] *Id.*

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[6] *See Nuclear Reg. Comm'n v. Federal Lab. Rel. Auth.*, 859 F.2d 302, 309-10 (4th Cir. 1988) (describing key legislative role of Representative Clay).

[7] As was explained, "when an employee is summoned to appear before the IRS Inspection Service . . . it is done without warning and seldom is the employee advised of the nature of the interview . . . . Upon arriving . . . the employee is immediately sworn in and must answer all questions . . . . With no one to advise them of their rights, few employees have the experience or presence of mind to deal with professionally trained criminal investigators who are supposed to be experts in the art of interrogation. Nervous and unaccustomed to such surroundings, employees are oftentimes questioned about matters which occurred years before. They may be subject to badgering or harassment, becoming so confused and flustered that they agree with answers suggested by the inspectors even though their responses do not truly reflect what transpired." *Leg. Hist.* at 645.

In sum, the example of the IRS Inspection Service exposes the fallacy of the Solicitor General's fundamental premise: that the phrase "representative of the agency" encompasses only "the management entity that has a collective relationship with a union." (NASA Br. at 18.) There is no basis for concluding that it was Congress' intent to deny union representation solely because the agency's investigative unit happens to be employed in a subcomponent that does not have a bargaining relationship with employees and their union. *See Defense Crim. Investigative Serv. v. Federal Lab. Rel. Auth.*, 855 F.2d 93, 99 (3rd Cir. 1988) (*DCIS v. FLRA*) (rejecting the government's argument to that effect).

2. Given the government's categorical position that OIG investigators can never function as "representatives of the agency," the Solicitor General would presumably maintain that, in the wake of the IRS Reform Act's conveyance of the Inspection Service's functions and investigators to the newly created TIGTA, the *Weingarten* rights of IRS bargaining unit employees have now evaporated —even though Congress said not a word about it. The notion that the Reform Act effected such an implied repeal of the fundamental employee representation rights conferred by the FSLMRS is untenable. Such a view underscores the lack of merit in the Solicitor General's sweeping position that OIG investigators are, by definition, not "representatives of" their agency within the meaning of the FSLMRS.

a. First, a contention that the IRS Reform Act impliedly repealed the *Weingarten* rights of IRS employees cannot be squared with this Court's precedent. In *United States v. Fausto*, 484 U.S. 439 (1987), the Court stressed that an implied repeal of a right conferred by "express statutory text" must be strongly disfavored because it is "strongly presumed that Congress will specifically address language in the statute books that it wishes to change."

Id. at 453. *See also County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 262 (1992) (citing "cardinal rule" that repeal by implication is strongly disfavored); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978) (relying on the "cardinal rule" in holding that a provision of the Endangered Species Act was not repealed by implication).

Fausto's application here is clear. By enactment of the FSLMRS in 1978, Congress gave union-represented federal employees an express right in the "statute books" (*Fausto*, 484 U.S. at 453) to union representation when they are examined under the circumstances delineated by section 7114(a)(2)(B). Encompassed by this right were examinations of bargaining unit employees by the IRS Inspection Service. Nothing in the IRS Reform Act purports to "specifically address" (*Fausto*, 484 U.S. at 453), much less repeal, employees' statutorily conferred *Weingarten* rights.

b. Examination of the purposes of the IRS Reform Act further confirms that Congress did not intend to extinguish the *Weingarten* rights of rank and file bargaining unit employees. The Act's history reveals Congress conducted a comprehensive inquiry into the operations of the IRS with special focus on the Inspection Service. In the course of doing so, Congress discovered a variety of flaws with respect to Inspection's operations. There was no evidence, however, that affording employees *Weingarten* protections during Inspection examinations was one of those flaws. Notwithstanding the magnifying glass placed on Inspection's operations, no one suggested, even remotely, that Inspection's recognition of *Weingarten* rights during its examinations had ever conflicted in any way with the functions of that office. Instead, the record is clear that Congress' primary goal in transferring functions from Inspection to the TIGTA was to ensure greater accountability of IRS' managers.[8] *See, e.g., Oversight Hearing*, at 44, 113.

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[8] The purpose of the Reform Act's creation of the TIGTA dovetails with the central goal of the Inspector General Act: to give

When viewed against the backdrop of the IRS Reform Act, the Solicitor General's urging of a *per se* rule that exempts all OIGs from section 7114(a)(2)(B) is wholly unpersuasive. As described, under the IRS Reform Act's transfer of functions from the Inspection Service to the new TIGTA, virtually all of the same investigatory personnel will continue to conduct examinations of rank and file employees. Those investigations will be carried out in the name of the Treasury Department, with the new Treasury OIG acting as the "strong right arm" of the agency head. *United States Nuclear Reg. Comm'n v. Federal Lab. Rel. Auth.*, 25 F.3d 229, 235 (4th Cir. 1994) (quoting S. Rep. No. 95-1071, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2684). Indeed, in fashioning the IRS Reform Act, Congress has made clear that the TIGTA is expected to be "responsive" to requests of the IRS Commissioner for investigations—including those of employees. *See supra* at 8. And, of course, it is undisputed that the former Inspection investigators, newly ensconced within TIGTA, will continue to make the information they collect available to Treasury and its IRS subcomponent for purposes of initiation of disciplinary actions against rank and file employees.

In sum, given these circumstances, it is difficult to fathom how TIGTA investigators would not be functioning as their agency's surrogates when they conduct employee examinations. The federal government's insistence on a blanket rule that OIG investigators can never be considered "representatives" of their agency defies a common

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IGs sufficient autonomy so that they would be able to vigorously investigate those agency managers who might be inclined to cover up their own ineffectiveness. *See DCIS v. FLRA*, 855 F.2d at 98. As the Eleventh Circuit pointed out, there is no indication that Congress believed that "the presence of a union representative at OIG interviews, as mandated by federal statute" was "interference" from which OIG investigators needed to be shielded. *FLRA v. NASA*, 120 F.3d at 1214. The IRS Reform Act and its history confirm the correctness of this view.

sense interpretation of that term. Nor, when applied in the context of the IRS, could such a *per se* approach be squared with Congress' intent in fashioning the IRS Reform Act.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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